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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1477

CHICAGO JOINT BOARD, AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,
Petitioner.

vs.

CHICAGO TRIBUNE COMPANY, CHICAGO AMERICAN PUBLISHING COMPANY AND FIELD ENTERPRISES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENT, FIELD ENTERPRISES, INC.

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April 15, 1971.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Statement of the Case 1

Argument 4

I. Decisions of a Private Newspaper of What Editorial Matter to Publish Do Not Constitute State Action 4

II. The Concept of Freedom of the Press Does Not Require Courts to Tell Publishers of Private Newspapers What They Must Print 7

III. The Facts of This Case Do Not Provide an Appropriate Vehicle for Review of the Issues Presented by the Petition 9

Conclusion 10

CITATIONS.

Cases.

Adderley v. Florida, 385 U. S. 39 (1966) 7

Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) 7

Food Employees v. Logan Valley Plaza, 391 U. S. 308 (1968) 5

Marsh v. Alabama, 326 U. S. 501 (1946) 5

New York Times v. Sullivan, 376 U. S. 254 (1964) 7

Terry v. Adams, 345 U. S. 461 (1953) 5

CONSTITUTIONAL PROVISIONS.

First and Fourteenth Amendments to United States Constitution 2, 4, 7, 9

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STATEMENT OF THE CASE.

Petitioner, the Chicago Joint Board of the Amalgamated Clothing Workers of America, AFL-CIO, tendered an advertisement for publication to various Chicago newspapers. [11-12*.] The advertisement urged consumers not to purchase clothing imported from foreign countries and sought to encourage the purchase instead of domestic clothing

* Unless otherwise indicated, page numbers refer to the Appendix for the Court of Appeals.

produced by union members. The advertisement specifically urged consumers to avoid purchasing such imported clothing at Marshall Field & Co., a large Chicago department store. The headline of the advertisement read: "You bet we're picketing Marshall Field & Co.", and above the headline was a drawing of the store's famous clock. Below the text of the advertisement was a drawing of persons carrying picket signs with such slogans as "Foreign Clothing Is Inferior" and "Savings on Imports Not Passed On", obviously implying that the store carried inferior merchandise and failed to pass savings on to customers. [Petition 1A.]

The Chicago Sun-Times and *The Chicago Daily News*, newspapers published by respondent, Field Enterprises, Inc., declined to publish the proffered advertisement because they felt that it unfairly singled out one retailer of imported clothing, Marshall Field & Co. [28.] Marshall Field & Co. is a regular advertiser in such newspapers. [11-12, 69.]

Petitioner then brought suit in the United States District Court for the Northern District of Illinois to require the newspapers published by respondent as well as Chicago newspapers (*The Chicago Tribune* and *Chicago Today*) published by other respondents to publish the subject advertisement. [15-16.]

Petitioner's complaint alleged that by declining to publish the advertisement respondents had breached an implied contract to publish the advertisement. [13-15.] Petitioner does not now, however, seek review of the judgment against it on those counts of the complaint based on such contractual theories. [Petition 3.] The complaint also alleged that in declining to accept the advertisement respondents had deprived petition of equal protection of the law and freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution. [12.]

The complaint alleged that the various respondents together "control and monopolize the general circulation newspaper industry in the City of Chicago." [8-9.] There was no allegation that the newspapers of any individual respondent control or monopolize that market nor was there any allegation that the respondents illegally acted in concert or in any other way violated any anti-trust laws. Indeed, the figures in the complaint showing the circulations of the various papers indicate the very vigorous competition in the newspaper market which obtains in Chicago. [9.]

By an amendment to the complaint, petitioner also added an additional count by which it sought to bring the case as a class action on behalf of anyone wishing to purchase space in respondents' newspapers "to communicate ideas, opinions or facts on a political or social issue." [104.] The amendment sought an injunction against respondents' "refusing to publish any lawful [paid] advertisement expressing ideas, opinions or facts on a political or social issue. . . ." and a declaratory judgment to the effect that respondents may not "arbitrarily" refuse to publish such advertisements. [106-107.]

The District Court granted respondents' motions for summary judgment in the case both as to the constitutional claims for which review is sought here and on the counts based on the contractual theory. [91-103.] The District Court held that the newspaper had expressly reserved the right to decline to publish proffered advertisements and that the private publication of a newspaper did not constitute state action, so that there was no federal constitutional claim upon which relief might be granted.

The Court of Appeals affirmed the judgment for respondents, also holding there to be no state action sufficient to require the courts to become involved in the decisions of publishers of private newspapers on what to publish or not to publish.

ARGUMENT.

Respondent, Field Enterprises, Inc., respectfully submits that the arguments given by petitioner why this case should be reviewed are based on misstatements of the holding below and on a strained and distorted reading of the existing law. Respondent further submits that a writ of certiorari should not be issued in this case because the case does not squarely present the issues on which petitioners seek review.

I. DECISIONS OF A PRIVATE NEWSPAPER OF WHAT EDITORIAL MATTER TO PUBLISH DO NOT CONSTITUTE STATE ACTION.

Petitioner claims that the holding of the Court of Appeals that publishing a private newspaper does not constitute state action is in conflict with existing cases and introduces a new "rule of presumption" in derogation of First Amendment freedoms. [Petition 8-11.] The petition thus urges that a writ of certiorari be issued for the purpose of correcting these "errors". These claims are, however, based on both a mistaken view of the existing cases and an imaginary reading of the decision below.

Contrary to the interpretation of the decision by the petition, the opinion of the Court of Appeals in no sense creates any rule of presumption of private action, rebuttable or otherwise, in derogation of freedom of speech. Rather, the Seventh Circuit simply and correctly held that there is neither any state action inherent in the private publishing of a newspaper nor any particular circumstances peculiar to the case at bar which would give rise to a finding of state action concerning the respondent's de-

clining to publish the proffered advertisement. Thus, in holding that there is nothing inherently governmental in publishing a newspaper of general circulation the Court of Appeals, quoting the District Court, stated that:

> "Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. . . . Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation." [Petition 26A.]

These statements, describing part of our basic heritage, do not indicate some new or dangerous presumption against freedom of speech. They simply recognize that the press is not an arm or function of the government. We neither have nor could we have an official government press, an *Izvestia, Pravda* or New China News Agency, here. [Petition 14A.]

This holding that there is nothing inherently governmental in publishing a private newspaper does not in any way conflict with the state action cases cited by petitioner. Each of those cited decisions related to a situation where a nominally private entity assumed functions normally associated with the state. In *Marsh* v. *Alabama,* 326 U. S. 501 (1946), for example, freedom of speech was held to extend to the streets of a company town. *Food Employees* v. *Logan Valley Plaza,* 391 U. S. 308 (1968), followed *Marsh* in holding that picketing was protected on the sidewalks in a shopping plaza which had assumed the status of a municipal square or central business area. Similarly, in *Terry* v. *Adams,* 345 U. S. 461 (1953), a so-called "private" political primary which in fact controlled the outcome of the final vote was also held to involve state action. None of those cases are relevant here as there is no allega-

tion that in deciding what to publish in their newspapers the respondents have assumed any function normally associated with the state.

Apparently realizing that it was grossly inadequate, if not absurd, to argue that the publication of a private newspaper was inherently governmental, the petitioner sought to assert in the Court of Appeals some special circumstances peculiar to the instant case which would tie the respondents and the state together as joint venturers or would show "state participation" in the management of the press. [8-9, Petition 32A-34A.]

First, petitioner asserted that the various respondents' newspapers together control and monopolize the newspapers industry in Chicago. [8-9, Petition 3.] The petitioner did not, however, allege that the newspapers of any one respondent controlled or monopolized that market, it never suggested that respondents do not vigorously compete in that market and it did not allege that they have in any way acted in concert. Whatever might be the facts in some other case, the instant case simply does not claim to present for review the situation of a newspaper monopoly or of a concerted refusal to deal.

Petitioner also points to a few statutory provisions by which the state generally recognizes the existence of newspapers as constitutionally protected vehicles of communication. [Petition 3, 19.] These provisions are themselves inadequate to suggest public participation in the management of the newspapers or a joint venture of press and state. Moreover, there are absolutely no allegations in the complaint that such provisions in fact have any impact even tending to tie respondents to the state or providing respondents state-granted benefits.

While petitioner points out that Illinois law requires legal notices to be printed in newspapers, there is no claim

that these notices are restricted to respondents' newspapers and there is no allegation indicating to what extent, if at all, respondents in fact publish such notices or derive any benefit therefrom. Likewise, there is mention of a Chicago ordinance regulating downtown newsstands, but there is no claim that in fact the ordinance is enforced [It is not] or that it serves to tie respondents to the state.

In sum, the particular facts of the instant situation, poorly elaborated in the complaint, do not show any substantial degree of state participation and involvement in respondents' businesses such as was present in *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961), cited by petitioner, where the restaurant in question was ancillary to the municipal parking garage from which it leased space.

II. THE CONCEPT OF FREEDOM OF THE PRESS DOES NOT REQUIRE COURTS TO TELL PUBLISHERS OF PRIVATE NEWSPAPERS WHAT THEY MUST PRINT.

A fundamental precept of American liberty lies in the freedom of the private press to publish or not to publish whatever comment or opinion it chooses. Petitioners would have this Court accept review of this case in order to reverse that fundamental precept.

Contrary to the petitioner's suggestion, the Constitution does not require the press to be subject to official or judicial scrutiny for "fairness and balance". Freedom of the press, as the Court of Appeals correctly indicated, includes freedom to be vehement, caustic or unpleasantly sharp, indeed, to be crusading or single-minded. [Petition 14A, 26A.] *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). Just as the freedom of speech does not give "people who want to propagandize protests or views . . . the constitutional right to do so whenever or wherever they please", *Adderley* v. *Florida,* 385 U. S. 39, 48 (1966),

the freedom of the press does not include the right to command the use of other persons' presses and publications.

The petition claims that to allow publishers discretion on what not to publish conflicts with the spirit and the letter of existing decisions. But petitioner is totally unable to cite any cases holding or implying that such discretion in the press must give way to all who would use the press for their own purposes. Of course, cases holding that public transit authorities or public school newspapers may not discriminate in accepting advertising provide no authority for the position that there exists a right of access to the private press.

In addition, the rule requiring a so-called "right of access" which the petitioner asks this Court now to invoke is described in contradictory terms by the complaint and has numerous inherent and unresolved pitfalls. The petitioner never quite decided, for instance, whether to argue that all lawful paid advertisements must be printed or whether respondents are prohibited only from being arbitrary in refusing advertising. [Compare first and second clauses of par. 5 of Count IV, Appendix 106.] The pitfalls as to either version are obvious. The former rule would require newspapers, against their will, to publish lawful but cruel, misleading or offensive material. Such advertisements by offending readers may very well tend to restrict and reduce the vitality of the press as a whole. On the other hand, if the rule urged by petitioner is that newspapers must be "non-arbitrary", the courts would be invested with the job of deciding what may reasonably be rejected, hardly a judicial function. In either event, the result would be to compromise the freedom of the press. Petitioner, moreover, is never clear why the constitutional rule or rules which it would have this Court invoke should be limited only to newspapers or should cover only those who can afford to pay to insert "editorial" advertisements.

It is therefore submitted that the decision of the Court of Appeals protects rather than restricts First Amendment freedoms. Moreover, the contradictory and open-ended rule which petitioner asks from this Court suggests that this particular case is not an appropriate one for review by this Court.

III. THE FACTS OF THIS CASE DO NOT PROVIDE AN APPROPRIATE VEHICLE FOR REVIEW OF THE ISSUES PRESENTED BY THE PETITION.

Respondent submits that this case is not appropriate for certiorari because the issues sought for review are not squarely presented by the facts of the case. The petition asks this Court to hold that the Constitution requires publishers to print all paid editorial advertising—advertising dealing with social or political issues—as long as it is not illegal. Not even petitioner claims that private newspapers are bound to accept all proffered commercial advertisements.

Yet the actual proposed advertisement which gave rise to the litigation in many ways has more of the attributes of commercial than of editorial advertising. The advertisement would urge readers to purchase those products made by the advertiser's members and not to purchase imported clothing. It especially involves the suggestion that readers avoid purchasing such imported products at the Marshall Field & Co. store. Thus, like most commercial advertisements, it urges the purchase of certain products and, unlike most advertisements, urges the non-purchase of other items—especially at a single store.

At best, then, the advertisement is on the border between commercial and editorial advertising. It makes disparaging reference to the policies and merchandise of another commercial advertiser of the same paper. Therefore, in

addition to the respondents' constitutional right to exercise its discretion with regard to the advertisement, there exist perfectly rational and non-arbitrary reasons for respondent to have declined to publish the particular advertising in issue. These factors make this particular case an especially poor vehicle for consideration of the propositions of constitutional law asserted in the petition.

The complaint also purports to be brought on behalf of all persons who may wish to offer advertising dealing with social or political matters to respondents' newspapers. But other than stating that there may be other advertisements concerning the sale by other retailers of imported clothing, the complaint does not provide any elaboration as to the nature of such "editorial advertising". In fact, the complaint does not even state that there is a single such advertisement other than the "You bet we're picketing Marshall Field & Co." advertisement which respondents have declined to publish. This "class action" aspect of the case is far too vague and speculative to provide a sufficiently concrete factual setting for the consideration of petitioner's novel and strained theories of freedom of speech.

This particular case, then, does not present an apt set of facts for review of the issues raised by the petitioner. No example of an arbitrary rejection of material or of the refusal to run purely editorial advertising is involved in this case. The case does not squarely present the points petitioner wishes to have reviewed.

CONCLUSION.

The decision of the Court of Appeals is not in conflict with previous decisions of this Court. It introduced no new rule of law limiting the freedom of speech. Moreover, the facts of this case do not squarely present the issues

which petitioner seeks to have reviewed. Therefore, respondent, Field Enterprises, Inc., respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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